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No. 07-1579

OCT 23 2008

In The

Supreme Court of the United States

MARIN ALLIANCE FOR MEDICAL MARIJUANA and LYNNETTE SHAW,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners respectfully move this Court for an order (1) vacating its order of October 6, 2008, which denied the petition for writ of certiorari filed by petitioners on June 12, 2008, and (2) granting the petition for writ of certiorari. The grounds for rehearing are stated below.

REASONS FOR GRANTING REHEARING

I. New Court Decisions and New Law-Enforcement Activity Involving Medical Marijuana Patients and Providers Demonstrate the Waste of Judicial and Law-Enforcement Resources Caused by the Irrational Classification of Marijuana in Schedule I.

Federal and state courts, already suffering from docket overload, increasingly are burdened with cases (including the instant case) that exist only because of the irrational classification of marijuana in Schedule I under the federal Controlled Substances Act (CSA). Some of these cases present difficult constitutional issues that arise from the differences between the treatment of medical marijuana under federal law (i.e., that there is no such thing as accepted medical use of marijuana) and its treatment under the laws of the growing number of states that permit medical use. Important opinions in two such cases (both state

and federal) have been issued since petitioners' June 12 filing in this Court.

County of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461 (Ct. App. 2008), concerned a California law which required counties to process applications and issue state identification cards to qualified persons, verifying their exemption from certain state marijuana laws in accordance with the Compassionate Use Act. *Id.* at 469. Two California counties sued to invalidate that law, asserting that it violated the Supremacy Clause (U.S. Const. art. VI, cl. 2), because the federal CSA prohibits possessing or using marijuana for any purpose. *Id.* at 467. The counties claimed that the identification card scheme "poses an obstacle to the congressional intent embodied in the CSA." *Id.* The California Court of Appeal engaged in a lengthy analysis of the various types of federal preemption and how they might apply to the legislation in question, *id.* at 475-483, and concluded that the CSA did not preempt the identification card law, *id.* at 483. Both counties filed petitions for review in the California Supreme Court; those petitions were denied on October 16, 2008.[1]

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[1] Another California case decided after petitioners filed their petition for writ of certiorari in this Court, *People v. Phomphakdy*, 81 Cal. Rptr. 3d 443 (Ct. App. 2008), presented a question of *California* constitutional law with regard to limits on how much marijuana a patient could possess in compliance with the Compassionate Use Act. *Id.* at 445. The court noted, however, that the defendant's physician – a board-certified internist who recommended marijuana as treatment for the defendant's

(Continued on following page)

The recent federal decision is *County of Santa Cruz v. Gonzales*, No. C 03-01802 JF, 2008 U.S. Dist. LEXIS 63867 (N.D. Cal. Aug. 20, 2008) (order granting in part and denying in part defendants' motion to dismiss).[2] In that case, the plaintiffs "allege that the federal government has a plan to force states to repeal laws permitting medical use of marijuana." *Id.* at *3-*4. The principal issue resolved by an August 20, 2008, order was whether or not the plaintiffs' complaint stated a claim on which relief could be granted as to violation of the Tenth Amendment. *Id.* at *7-*12. The district court held that the plaintiffs' allegations – i.e., that federal officials have threatened to punish California physicians who recommend marijuana, threatened government officials who issue medical marijuana identification cards, interfered with municipal zoning plans, and targeted for arrest

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back pain, insomnia, stress, and anxiety – "did not state how much marijuana defendant should ingest, because [the doctor] feared violating federal laws if he made recommendations as to an amount." *Id.* at 446. A third new California case, *City of Corona v. Naulls*, 83 Cal. Rptr. 3d 1 (Ct. App. 2008), originated when the City of Corona filed a lawsuit alleging that a medical marijuana dispensary was a public nuisance, in part because it was operating in violation of the CSA. *Id.* at 5.

[2] The district court stated that its order "is not designated for publication and may not be cited." *Id.* at *3 n.1. Petitioners herein do not cite the order as precedent or suggest that this Court should adopt its reasoning; they refer to it only as an example of the litigation spawned by the tension between the CSA's irrational classification of marijuana, on the one hand, and state and local governments' recognition that marijuana has some currently accepted medical use, on the other.

and prosecution those providers of medical marijuana who cooperate most closely with municipalities, *id.* at *8-*9 – sufficed to state a claim. The court explained:

> If Plaintiffs can prove that Defendants are enforcing the CSA in the manner alleged, a question as to which the Court expresses no opinion, they may be able to show that Defendants deliberately are seeking to frustrate the state's ability to determine whether an individual's use of marijuana is permissible under California law. A working system of recommendations, identification cards and medicinal providers is essential to the administration of California's medical marijuana law. The effect of a concerted effort to disrupt that system at least arguably would be to require state officials to enforce the terms of the CSA.

Id. at *11-*12.

The expenditure of time and money litigating these constitutional claims would be entirely unnecessary if the CSA, consistent with the massive body of evidence, were to acknowledge the current acceptance of medicinal value of marijuana. For example, one potential result of rescheduling could be to include marijuana among the "drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use – drugs like morphine and amphetamines – [and thus] are available by prescription." *Gonzalez v. Raich*, 545 U.S. 1, 63-64 (2005). If federal law did not prohibit a patient's possessing marijuana for medical purposes with a doctor's prescription,

there could be no colorable assertion, as in *County of San Diego v. San Diego NORML*, that the Compassionate Use Act is preempted by the federal CSA. If federal officials were not duty-bound to enforce an absolute ban on medical marijuana, there would be no litigation, as in *County of Santa Cruz v. Gonzales*, about whether such enforcement violates the Tenth Amendment because of its interference with California's prerogatives.

Because of the irrational classification of marijuana in Schedule I, however, the waste of precious resources goes on, both in the courts and in law enforcement. In the few months since petitioners filed their petition in this Court, federal officers have conducted numerous raids against providers of medical marijuana in California. By way of example, some of these enforcement activities have occurred during the month this petition is being prepared (October 2008). On October 7, Drug Enforcement Administration (DEA) agents raided the Laguna Beach Holistic Center, a medical marijuana dispensary in Laguna Beach (Orange County). *See Medical Marijuana in the News*, Orange County Register, Oct. 14, 2008, http://www.ocregister.com/articles/marijuana-unit-federal-2193340-patients-medical. The next day, October 8, DEA agents raided We Are Hemp, a medical marijuana dispensary in Cherryland (Alameda County). Eric Kurhi, *Federal agents raid Cherryland pot club*, Inside Bay Area, Oct. 9, 2008, http://www. insidebayarea.com/california/ci_10671858.

If this Court were to determine that the CSA's classification of marijuana in Schedule I violates due process because it does not bear a rational relationship to a legitimate government interest, the expenditure of resources on the sort of litigation and law enforcement described in this argument would be unnecessary. This is a compelling reason for this Court to grant certiorari and decide (or remand this case for the courts below to decide) whether, based on all of the available evidence, it is rational to hold that marijuana "has no *currently* accepted medical use in treatment in the United States." 21 U.S.C.S. § 812(b)(1) (emphasis added).

II. New Studies and Statements by Professional Medical Organizations Confirm that Marijuana Has Currently Accepted Medical Use in Treatment in the United States.

Over the summer and early fall of 2008, the scientific evidence that marijuana *does* have legitimate medicinal uses, and the evidence that these uses are currently "accepted" by doctors and other health care professionals, has become even more persuasive. With regard to scientific evidence, more medical studies confirming marijuana's medicinal value have been published since petitioners' June 12 original filing.

The results of one important new study were announced by the University of California, San Diego School of Medicine on August 6. *Medicinal marijuana*

effective for HIV neuropathic pain, UC Newsroom, Aug. 6, 2008, http://www.universityofcalifornia.edu/news/article/18348. The study was a double-blind, placebo-controlled clinical trial assessing the impact of smoked marijuana on neuropathic pain associated with HIV. Study leader Dr. Ronald J. Ellis, an associate professor of neurosciences, stated, "We found that smoked cannabis was generally well-tolerated and effective when added to the patient's existing pain medication, resulting in increased pain relief." *Id.*[3] The university stated that the study's "findings are consistent with and extend other recent research supporting the short-term efficacy of cannabis for neuropathic pain." *Id.*[4]

Further evidence that marijuana has currently accepted medical use in the United States emerged from the June 12-14, 2008, annual meeting of the Medical Student Section (MSS) of the American Medical Association (AMA).[5] The MSS, an organization of over 50,000 medical students who treat patients and

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[3] Dr. Ellis explained, "Neuropathy is a chronic and significant problem in HIV patients as there are few existing treatments that offer adequate pain management to sufferers." *Id.*

[4] The study was published in the journal *Neuropsychopharmacology*. Neuropsychopharmacology - Abstract of article: *Smoked Medicinal Cannabis for Neuropathic Pain in HIV: A Randomized, Crossover Clinical Trial*, http://www.nature.com/npp/journal/vaop/ncurrent/abs/npp2008120a.html.

[5] For a summary of the MSS annual meeting, see AMA (MSS) 2008 Annual Meeting, http://www.ama-assn.org/ama/pub/category/18697.html.

are full members of the AMA,[6] issued a strong and direct statement that marijuana should be rescheduled out of Schedule I of the CSA. The MSS resolution states, in relevant part:

> Whereas, . . . the accumulated scientific data regarding marijuana's safety and efficacy in certain clinical conditions and its *increasingly accepted medical use in treatment* can no longer be ignored; therefore be it
>
> RESOLVED, That our AMA support review of marijuana's status as a Schedule I controlled substance, its reclassification into a more appropriate schedule, and revision of the current protocol for obtaining research-grade marijuana so that it conforms to the same standards established for obtaining every other scheduled drug for legitimate research purposes; and be it further
>
> RESOLVED, That our AMA strongly support exemption from federal criminal prosecution, civil liability, and professional sanctioning for physicians who recommend medical marijuana in accordance with state law, as well as full legal protections for patients who use medical marijuana under these circumstances . . . .

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[6] For details about the MSS, see AMA Medical Student Section (MSS), http://www.ama-assn.org/ama/pub/category/14.html.

American Medical Association, Medical Student Section, Resolution 2 (A-08) 2 (2008), http://americansforsafeaccess.org/downloads/MSS-AMA_Resolution.pdf [hereafter MSS Res. 2 (A-08)] (emphasis added, footnote omitted); *see also* Summary of Actions, Medical Student Section Resolutions 1, http://www.ama-assn.org/ama1/pub/upload/mm/15/a-08_mss_proceedings.pdf (MSS Resolution 2 adopted; MSS resolves that "AMA support reclassification of marijuana's status as a Schedule I controlled substance into a more appropriate schedule").[7]

As the scientific studies and medical-group endorsements pile up, and as more patients are treated with marijuana in the states that allow such treatment, the CSA's classification of marijuana as a drug with no currently accepted medical use in the United States becomes ever more fantastic. Raids by federal law-enforcement officers (and injunctions issued by federal judges) shut down the dispensaries that are essential to fulfilling the intent of the medical marijuana laws. These federal actions frustrate

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[7] In support of its resolution, the MSS cited the following organizations which have stated that marijuana has accepted therapeutic value: National Academy of Sciences' Institute of Medicine, American College of Physicians, American Psychiatric Association's Assembly, American Academy of Addiction Psychiatry, American Academy of Family Physicians, California Medical Association, Medical Society of the State of New York, Rhode Island Medical Society, American Academy of HIV Medicine, HIV Medicine Association, Canadian Medical Association, British Medical Association, and the Leukemia & Lymphoma Society. MSS Res. 2 (A-08) 1.

the state procedures in place which allow law enforcement to discern between legal and illegal use of medical marijuana in the same way they discern between legal and illegal use of other physician-recommended medications. Courts are burdened with lawsuits raising difficult constitutional questions arising from the tension between the federal CSA and state medical marijuana laws. It is critical that this Court grant certiorari and make a ruling on whether the CSA's Schedule I classification of marijuana survives rational-basis review on the currently available evidence, or at least require the courts below to do so.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition for writ of certiorari, and review the judgment below.

Respectfully submitted,

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Date: October 28, 2008

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

GREG ANTON